Avoiding Adverse Impact In Employment Practices

4/10/2012

Scope—This article defines adverse impact, discusses the Uniform Guidelines for Employee Selection Procedures and explains when adverse impact typically occurs and how to calculate it. It is intended to provide broad coverage of the topic for all HR practitioners. It does not address developing affirmative action plans or managing affirmative action programs.

Overview

Adverse impact refers to employment practices that appear neutral but have a discriminatory effect on a protected group. Adverse impact may occur in hiring, promotion, training and development, transfer, layoff, and even performance appraisals. It may be found in an overall procedure or in any step in the overall procedure. A test or selection procedure can be an effective management tool, but no test or selection procedure should be implemented without a thorough understanding of its effectiveness and limitations for the organization, its appropriateness for a specific job, and whether it can be appropriately administered and scored.


Adverse impact can be a result of "systemic discrimination," which has received greater scrutiny from the Equal Employment Opportunity Commission (EEOC) in recent years. See, *EEC Stepping Up Efforts to Eliminate Systemic Discrimination* and *EEOC’s Systemic Bias Initiative Prompts ‘Culture Change’*.

This article provides a definition of adverse impact and explains the differences between disparate impact and disparate treatment. It reviews the Uniform Guidelines on Employee Selection Procedures and the Equal Employment Opportunity Commission (EEOC) enforcement actions, including several recent cases. A step-by-step process for determining adverse impact is provided, along with sample calculations. The article closes with best practice recommendations from the Center for Corporate Equality.

Business Case

Few businesses today intentionally discriminate in employment based on race, sex, religion or other protected classes. However, businesses can inadvertently get into legal trouble through adverse impact discrimination. Managers must recognize the fact that what may, on the surface, appear to be an EEO-neutral employment criterion might, on closer examination, have an illegal disparate impact on applicants or employees, and perhaps not even benefit the organization in terms of the particular criterion being screened.

Compliance with the EEO laws in terms of adverse impact is probably not at the top of the typical manager's to-do list, but it is something the manager cannot ignore. Adverse impact lawsuits generally involve multiple employees and many years of organizational practice. So the damages claims can be high and the lawsuits costly, and the cases are attractive to attorneys who specialize in handling class actions on a contingent fee basis.

Whenever an organization has a job requirement such as a certain level of education or physical ability or a particular dress or grooming code, a good manager should question whether that criterion really screens for an relevant job attribute and whether that criterion may inadvertently constitute adverse impact discrimination.

HR’s Role

As stated above, most managers probably do not consider the concept of adverse impact discrimination. The concept is not intuitive in terms of economics or good/bad intentions. Typically, a manager will think that any stated criterion for a job is legal unless it is explicitly discriminatory based on one of the EEO protected classes. However, the typical manager would be very wrong in such a belief because discriminatory employment practices can be illegal even if they are not intentionally discriminatory.

HR plays multiple roles in regard to adverse impact discrimination. HR must make sure that the hiring process, including education requirements, fitness tests and other factors, is legal not only in terms of intentional discrimination (disparate treatment) but also in terms of unintentional discrimination (disparate impact). HR must make sure that EEO compliance continues after hiring through the entire employment relationship. Any change in policy has the potential of creating an illegal disparate impact upon a protected class. HR professionals must be alert to such issues that are likely to be missed by typical business managers and see things that other people do not see. So the first role of HR professionals is seeing "the elephant in the room" when no one else does.

The next job of the HR professional is to make sure that he or she is not complicit in inviting the elephant into the room by means of job applications, fitness tests or policies that have a prohibited EEO adverse impact.


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Third, HR professionals must effectively communicate to managers that—as strange as it may sound—a seemingly innocent policy or practice may actually subject the organization to a class action lawsuit. HR professionals also need to be good at communicating the legitimacy of organizational policies to employees who think the world revolves around their particular protected class.

What Is Adverse Impact?

Adverse impact occurs when a decision, practice or policy has a disproportionately negative effect on a protected group, even though the adverse impact may be unintentional. The Equal Employment Opportunity Commission (EEOC) guidelines and the Uniform Guidelines on Employee Selection Procedures define adverse impact as “a substantially different rate of selection in hiring, promotion or other employment decision which works to the disadvantage of members of a race, sex or ethnic group.” When adverse impact exists, an organization may be vulnerable to charges of discrimination.

The agencies have adopted a rule of thumb under which they will generally consider any group’s selection rate that is less than four-fifths (4/5ths) or 80 percent of the selection rate for the group with the highest selection rate as a substantially different rate of selection. This “4/5ths” or “80 percent” guideline is not intended as a legal definition but is a practical means of keeping the attention of the enforcement agencies on serious discrepancies in rates of hiring, promotion and other selection decisions. See, Adverse Impact and Disparate Treatment: Two Types of Discrimination and What are disparate impact and disparate treatment?

Background

The Supreme Court of the United States first described the disparate impact theory in 1971 in Griggs v. Duke Power Co., 401 U.S. 424, 431-2 (1971). Prior to the passage of the Civil Rights Act of 1964, Duke Power Co. had a policy of segregating employees according to race. Specifically, at its Dan River plant, African-Americans were only allowed to work in the “labor department” where the jobs were among the lowest-paying positions in the company rather than in one of the four “operating” departments.

After Title VII of the Civil Rights Act of 1964 was passed, the company changed its policies, adding a requirement of a high school diploma or a minimum score on an IQ test for positions in areas other than the labor department, thus eliminating a large number of African-American applicants for positions outside that department. The Court found that under Title VII, if tests disparately affect ethnic minority groups, businesses must demonstrate that such tests are “reasonably related” to the job for which the tests are required.

Disparate Treatment

Title VII prohibits intentional discrimination based on race, color, religion, sex or national origin. It also prohibits both disparate treatment and disparate impact discrimination. For example, Title VII forbids a covered employer from testing the reading ability of African-American applicants or employees when the reading ability of their white counterparts is not tested. This is called disparate treatment discrimination. Disparate treatment cases typically address the following questions:

- Were people of a different race, color, religion, sex or national origin treated differently?
- Is there any evidence of bias, such as discriminatory statements?
- What is the employer’s reason for the difference in treatment?
- Does the evidence show that the employer’s reason for the difference in treatment is untrue and that the real reason for the different treatment is race, color, religion, sex or national origin?

Disparate Impact

Title VII also prohibits employers from using neutral tests or selection procedures that have the effect of disproportionately excluding persons based on race, color, religion, sex or national origin. If the tests or selection procedures are not job-related for the position in question and consistent with business necessity. This is called disparate impact or adverse impact discrimination. See, What is “disparate impact”? Disparate impact cases typically address the following questions:

- Does the employer use a particular employment practice that has a disparate impact on the basis of race, color, religion, sex or national origin? For example, if an employer requires that all applicants pass a physical agility test, does the test disproportionately screen out women? Determining whether a test or other selection procedure has a disparate impact on a particular group ordinarily requires a statistical analysis.
- If the selection procedure has a disparate impact based on race, color, religion, sex or national origin, can the employer show that the selection procedure is job related and consistent with business necessity? An employer can meet this standard by showing that the procedure is necessary to the safe and efficient performance of the job. The policy or practice should therefore be associated with the skills needed to perform the job successfully. In contrast to a general measurement of applicants’ or employees’ skills, the policy or practice must evaluate an individual’s skills as related to the particular job in question. If the employer shows that the selection procedure is job related and consistent with business necessity, then anyone who challenges the selection procedure must demonstrate that a less discriminatory alternative is available. For example, is another test available that would be equally effective in predicting job performance but would not disproportionately exclude the protected group?

Uniform Guidelines on Employee Selection Procedures

In 1978 the Civil Service Commission, U.S. Department of Labor, Equal Employment Opportunity Commission (EEOC) and U.S. Department of Justice jointly adopted the Uniform Guidelines on Employee Selection Procedures to establish uniform standards for the use of selection procedures by employers and to address adverse impact, validation and record-keeping requirements. The Uniform Guidelines document a uniform federal position in the area of prohibiting discrimination in employment practices on the basis of race, color, religion, sex or national origin. The Uniform Guidelines outline the requirements necessary for employers to legally defend their employment decisions based on overall selection processes and specific selection procedures.

The basic principle of the Uniform Guidelines is that a selection process that has an adverse impact on the employment opportunities of members of a race, color, religion, sex or national origin group and thus disproportionately screens them out is unlawfully discriminatory unless the process or its component procedures have been validated in accord with the Guidelines or the user otherwise justifies them in accord with federal law. This principle was adopted by the Supreme Court unanimously in Griggs v. Duke Power Co., 401 U.S. 424, 431-2 (1971) and was ratified and endorsed by Congress when it passed the Equal Employment Opportunity Act of 1972, which amended Title VII of the Civil Rights Act.

Though the Uniform Guidelines are not legislation or law, they are relied on by courts as a source of technical information and are typically given significant weight by the courts. The Uniform Guidelines apply to most private employers having 15 or more employees for 20 weeks or more a calendar year and to most employment agencies,
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labor organizations and apprenticeship committees. They also apply to state and local governments with 15 or more employees. They apply through Executive Order 11246 to contractors and subcontractors of the federal government and to contractors and subcontractors under federally assisted construction contracts. See, Are all employers with 15 or more employees required to follow the Uniform Guidelines on Employee Selection Procedures, including adverse impact testing and applicant tracking?

The Uniform Guidelines provide standards for the proper use of employment testing, including the definition of discrimination in testing, the appropriate means of validating selection procedures that may be discriminatory, the acceptable methods of establishing and implementing cutoff scores (or pass points) on selection procedures, and the documentation of validity for selection procedures. The Uniform Guidelines pertain to any and all selection procedures used as the basis for any employment decision, including hiring, promotion, demotion, referral, retention, licensing and certification, training, and transfer.

Further, the Uniform Guidelines define selection procedures to include any measure, combination of measures or procedure used as a basis for any employment decision. Selection procedures, as defined by the Uniform Guidelines, include the full range of assessment techniques such as written exams, performance tests, training programs, probationary periods, interviews, reviews of experience or education, work samples, and physical requirements.

If the use of a particular selection procedure results in adverse impact, the employer can eliminate the use of the procedure, thus eliminating the adverse impact. Or if the employer wishes to continue to use the procedure, it must demonstrate the "business necessity" of the selection procedure— that is, a clear relationship between the selection procedure and performance of the job. This process is known as validation.

EEOC Enforcement Actions

According to the EEOC, employment testing has increased, due in part to post-September 11 security concerns as well as to concerns about workplace violence, safety and liability. In addition, the large-scale adoption of online job applications has motivated employers to seek ever more efficient ways of screening large numbers of online applicants in an objective way.

The number of discrimination charges filed with the EEOC relative to employment testing and exclusions based on criminal background checks, credit reports and other selection procedures reached a high point in 2007 at 304 charges.

Title VII permits employment tests as long as they are not “designed, intended or used to discriminate because of race, color, religion, sex or national origin.” Title VII also imposes restrictions on how to score tests. Employers are not permitted to 1) adjust the scores, 2) use different cutoff scores, or 3) otherwise alter the results of employment-related tests on the basis of race, color, religion, sex or national origin.

Several recent EEOC enforcement actions have specifically focused on testing:

- **EEOC v. Ford Motor Co. and United Automobile Workers of America** (2005) involved a court-approved settlement agreement on behalf of a nationwide class of African-Americans who were rejected for an apprenticeship program after taking a cognitive test known as the Apprenticeship Training Selection System (ATSS). The ATSS was a written cognitive test that measured verbal, numerical and spatial reasoning in order to evaluate mechanical aptitude. Although it had been validated in 1991, the ATSS continued to have a statistically significant disparate impact by excluding African-American applicants. Less discriminatory selection procedures were subsequently developed that would have served Ford’s needs, but Ford did not modify its procedures. In the settlement agreement, Ford agreed to replace the ATSS with a selection procedure to be designed by a jointly selected industrial psychologist. The new procedure would predict job success and reduce adverse impact. In addition, Ford paid $8.55 million in monetary relief.

- In **EEOC v. Dial Corp.**, 469 F.3d 735 (2006), women were disproportionately rejected for entry-level production jobs because of a strength test. The test had a significant adverse impact on women: prior to the use of the test, 46 percent of hires were women; after use of the test, only 15 percent of hires were women. Dial defended the test by noting that the test closely resembled the job and that use of the test had resulted in fewer injuries to hired workers. However, through expert testimony, the EEOC established that the test was considerably more difficult than the job and that the reduction in injuries occurred two years before the test was implemented, most likely due to improved training and better job rotation procedures. On appeal, the U.S. Court of Appeals for the 8th Circuit upheld the trial court’s finding that Dial’s use of the test violated Title VII under the disparate impact theory of discrimination.

Determining Adverse Impact

The Uniform Guidelines have adopted a practical means of determining adverse impact in a selection procedure. This “rule of thumb” established by the Uniform Guidelines is known as the “4/5ths” or “80 percent” rule. To determine whether a selection procedure violates the 4/5ths or 80 percent rule, the selection rate (or passing rate, where applicable) for the group with the highest selection rate is compared to the selection rates for the other groups. If any of the comparison groups do not have a passing rate equal to or greater than 80 percent of the passing rate of the highest group, then it is generally held that evidence of adverse impact exists for the particular selection procedure.

Four-step process

A four-step process determines adverse impact:

1. Calculate the rate of selection for each group (divide the number of persons selected from a group by the number of applicants from that group).

2. Determine which group has the highest selection rate. For positive personnel transactions, the highest rate is the most advantageous. For negative personnel transactions, the most favored group has the lowest rate.

3. Calculate the impact ratios by comparing the selection rate for each group with that of the highest group (divide the selection rate for a group by the selection rate for the highest group).

4. Observe whether the selection rate for any group is substantially less (i.e., usually less than 4/5ths or 80 percent) than the selection rate for the highest group. If it is, adverse impact is indicated in most circumstances.

Calculations examples

For example:

<table>
<thead>
<tr>
<th>EEO</th>
<th>Applicants</th>
<th>Hires</th>
<th>Selection Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
A comparison of the Latino selection rate (30 percent) with the Caucasian selection rate (60 percent) shows that the Latino rate is 30/60, or one-half (50 percent) of the Caucasian rate. Since one-half (50 percent) is less than 4/5ths (80 percent), adverse impact is usually indicated. Further examples of how to calculate impact ratio for both hiring and termination are shown below.

**Step 1: Impact Ratio for Hiring—Calculate the Rate of Selection**

<table>
<thead>
<tr>
<th>EEO Group</th>
<th>Applicants</th>
<th>Hires</th>
<th>Percent Hired</th>
</tr>
</thead>
<tbody>
<tr>
<td>African-American</td>
<td>108</td>
<td>25</td>
<td>23</td>
</tr>
<tr>
<td>Latino</td>
<td>78</td>
<td>24</td>
<td>31</td>
</tr>
<tr>
<td>Caucasian</td>
<td>325</td>
<td>114</td>
<td>35</td>
</tr>
</tbody>
</table>

The group with the highest selection rate is Caucasian, with 35 percent. Next, calculate the impact ratio.

**Step 2: Impact Ratio for Hiring—Calculate the Impact Ratio**

<table>
<thead>
<tr>
<th>EEO Group</th>
<th>Percent Hired</th>
<th>Divide</th>
<th>Impact Ratio</th>
<th>Adverse Impact?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Caucasian</td>
<td>35</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>African-American</td>
<td>23</td>
<td>23/35</td>
<td>66%</td>
<td>Yes; it is less than 80%</td>
</tr>
<tr>
<td>Latino</td>
<td>31</td>
<td>31/35</td>
<td>88%</td>
<td>No; it is more than 80%</td>
</tr>
</tbody>
</table>

Adverse impact is determined first for the overall selection process for each job. If the overall selection process has an adverse impact, the adverse impact of the individual selection procedure should be analyzed. If the employer continues to use any selection procedures that have an adverse impact, the employer is expected to have evidence of these procedures’ validity satisfying the Uniform Guidelines.

In the next example, the impact ratio for termination is calculated for a group of terminated employees.

**Step 1: Impact Ratio for Termination—Determine the Group With the Lowest Rate of Selection**

<table>
<thead>
<tr>
<th>EEO Group</th>
<th>Employees</th>
<th>Selected for Termination</th>
<th>Percent Selected</th>
</tr>
</thead>
<tbody>
<tr>
<td>Males</td>
<td>162</td>
<td>12</td>
<td>7</td>
</tr>
<tr>
<td>Females</td>
<td>178</td>
<td>33</td>
<td>19</td>
</tr>
</tbody>
</table>

Clearly, the group with the lowest selection rate is male, with 7 percent. Next, calculate the impact ratio. Remember, for negative actions, place the most favored group’s rate in the numerator position.

**Step 2: Impact Ratio for Termination—Calculate the Impact Ratio for Each Group**

<table>
<thead>
<tr>
<th>EEO Group</th>
<th>Percent Selected for</th>
<th>Divide</th>
<th>Impact Ratio</th>
<th>Adverse Impact?</th>
</tr>
</thead>
</table>
Drawbacks to the use of the impact ratio

A major drawback to using the impact ratio is that it is subject to sampling errors when the sample size and selection rates are small. Employers should note that the Uniform Guidelines contain language that allows for more rigorous statistical tests (e.g., chi-square or Fisher’s exact test). In addition, depending on the distribution of the data, one method may yield evidence of adverse impact while another may not. Another key point to remember is that after first applying the adverse impact analysis to the overall selection process, it may be applied to each individual step in the process as well if adverse impact is found in the overall selection process. The analysis may be applied to any groups, such as male/female or over/under age 40.

Requirement for validation and continuous test monitoring

Employers should ensure that employment tests and other selection procedures are properly validated for the positions and purposes for which they are used. The test or selection procedure must be job related and its results appropriate for the employer’s purpose. While a testing vendor’s documentation supporting the validity of a test may be helpful evidence, the employer is still solely responsible for ensuring that its tests are valid under the Uniform Guidelines.

If a selection procedure screens out a protected group, the employer should determine whether an equally effective alternative selection procedure that has less adverse impact is available and, if so, should adopt the alternative procedure. For example, if the selection procedure is a test, the employer should determine whether another test would predict job performance but not disproportionately exclude the protected group.

Metrics and Technology

The whole concept of adverse impact discrimination is premised on the application of metrics. The 4/5ths rule of thumb is based on an arbitrary figure derived by mathematical calculation. Accordingly, compliance with the adverse impact laws begs for the application of technology. This can be done with spreadsheets constructed within the organization or with specialized computer applications and consultants outside the organization. See, Transforming HR Through Technology (PDF).

Global Issues

Most countries do not have laws prohibiting adverse impact discrimination. The prohibition against adverse impact discrimination is largely an American invention. However, the concept has caught on in the European Union. See, Indirect Discrimination in EC Law.

The United State’s sensitivity to adverse impact discrimination stems from the fact that it is a nation of immigrants, and conflicts have always existed between races, religions and other groups in the U.S. Yet, in trying to create a melting pot, rather than a pure strain, the U.S. attempts to eliminate employment discrimination, even when such discrimination is inadvertent.

HR professionals should acquaint themselves with the customs and mores of other cultures in order to avoid adverse impact discrimination in those countries and when foreign companies do business in the U.S. Even if not illegal in a particular country, adverse impact discrimination can have a detrimental effect on organizational success.

Best Practice Recommendations

The Center for Corporate Equality issued a 98-page Technical Advisory Committee Report (PDF) on September 15, 2010, containing recommendations on best practices in how to conduct adverse impact analyses based on input from 70 of the nation’s top experts in adverse impact analyses. It has been suggested that any HR professional who performs affirmative action plans and adverse impact analyses can use the report as a “field manual.” See, Report Reviews Best Practices in Adverse Impact Analyses.

Among its numerous findings, the report concluded that the 80 percent rule is not a very good analysis “and may only be computed today because the UGESP [Uniform Guidelines on Employee Selection Procedures] still exist.”

Legal and policy issues

The following themes emerged from the report’s section on legal and policy issues related to adverse impact analyses:

- When internal and external job seekers apply together for the same requisition, analyzing them together to evaluate the impact of the selection process is reasonable. However, if they are not being considered simultaneously, keeping them as two different pools for analysis is reasonable.
- Although the statistical methodologies used for a disparate impact and disparate treatment or practice may be the same, the material facts of the case and the ultimate burden of proof are very different.
- Actionable adverse impact is difficult to define in the abstract. Context must be taken into account before one can feel confident that the observed differences in selection rates are actionable under the law.
- Context always matters when making a decision on whether applicant data can reasonably be aggregated. Aggregating data across multiple locations may be appropriate if the selection process is standardized and applied consistently from one location to another.
- A statistically significant disparity for the “total minority” aggregate without a statistical indicator for a particular protected class (e.g., black, white, Hispanic, Asian) is not legally actionable impact in most situations.

Keep in mind that anything used to make a selection decision may be considered a test and should be monitored for adverse impact. If impact is identified, the selection process should be validated in accordance with the Uniform Guidelines.

Other recommendations
Other recommendations from the report include the following:

- Organizations should not guess the gender or race of applicants who do not self-identify their race or gender. To be considered an applicant in an adverse impact analysis, a job seeker must meet the following five criteria: express an interest in an open position with an organization, follow an organization’s rules for applying properly, meet the basic qualifications for the position, actually be considered by the organization, and not withdraw from the application process.
- Applicants who submit more than one application for an open position should be counted only once in the adverse impact analysis.
- Applicants who are offered a job should be counted as a selection regardless of whether they accept the offer.
- Measures of statistical and practical significance should be included in determining the existence of adverse impact.
- Several measures of statistical significance can be used to determine adverse impact. The appropriateness of any method is a function of the way in which employment decisions are made.
- The decision to aggregate data across jobs, locations or requisitions should be made after considering the degree of structure in the selection process as well as the numerical and demographic similarity of the locations and requisitions.

Important differences exist in pattern or practice scenarios and adverse impact. Disparity analyses may play significant roles in both scenarios, but care should be taken to understand the employment process being analyzed.

Endnotes


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